THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	OEA Matter No.: 2401-0272-09
JIM IRVIN,	)	
Employee	)	
	)	Date of Issuance: August 8, 2011
v.	)	
	)	
D.C. PUBLIC SCHOOLS,	)	
Agency	)	Sommer J. Murphy, Esq.
	)	Administrative Judge

Mark Murphy, Employee Representative
Sara White, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On September 8, 2009, Jim Irvin ("Employee") filed a petition for appeal with the Office of Employee Appeals ("OEA" or "the Office") contesting the District of Columbia Public Schools' ("Agency") action of abolishing his position through a Reduction-in-Force ("RIF"). Employee's position of record at the time of his termination was a RW-3 Custodian at Anacostia Senior High School. The effective date of the RIF was August 28, 2009.

I was assigned this matter on or around January 2011. On March 21, 2011, I issued an order convening a status hearing conference on April 7, 2011 for the purpose of assessing the parties' arguments and to determine whether a hearing was required. Both Agency's counsel and Employee appeared at the above mentioned hearing; however, Employee stated that he had acquired representation and requested to postpone the status conference. I verbally instructed the parties that the matter would be rescheduled on a later date. On May 27, 2011, I issued a second order scheduling a status conference on June 15, 2011. At the status conference, I ordered both parties to submit post-conference briefs regarding the RIF. Employee and Agency submitted timely briefs. Based on the record, I determined that a hearing was not required. The record is now closed.

JURISDICTION

This Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

ISSUE

Whether Agency's action of separating Employee from service pursuant to a RIF was done in accordance with all applicable laws, rules, or regulations.

BURDEN OF PROOF

OEA Rule 629.1, 46 D.C. Reg. 9317 (1999) states:

> The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:
>
> > That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

OEA Rule 629.3 *id.* states:

> For appeals filed on or after October 21, 1998, the Agency shall have the burden of proof, except for issues of jurisdiction.

FINDINGS OF FACTS, ANALYSIS, AND CONCLUSIONS OF LAW

On June 22, 2009, District of Columbia School System's Chancellor Michelle Rhee determined that Agency needed to conduct a RIF of non-instructional, school-based staff. Twenty three (23) schools were closed after the 2007-2008 school year and an additional three (3) schools were closed after the 2008-2009 school year. According to Agency, the reduction in school facilities necessitated a significant reduction in staffing. In particular, custodial staff positions were to be identified and abolished on a school-by-school basis.

Employee's competitive area was Anacostia Senior High School. Employee's competitive level was RW Custodian. There were six (6) other employees who competed at the RW Custodian level. Two Custodian positions were identified as positions to be abolished under the RIF. Employee received a total of eight (8) points on his Competitive Level Documentation Form ("CLDF"), and was therefore ranked the lowest in his competitive area.

Employee took exception to being terminated under the RIF and filed a petition for appeal with this Office. Employee argued that his termination was unjust based on his seniority with Agency. Employee also argued that Agency violated RIF regulations because budget

restraints did not exist at the time he was terminated. Agency asserts that it conducted the RIF in full accordance with all applicable statutes, rules and regulations.

Because Employee's termination was the result of a RIF, I am guided primarily by D.C. Official Code § 1-624.08, which states in pertinent part that:

> (d) An employee affected by the abolishment of a position pursuant to this section who, but for this section would be entitled to compete for retention, shall be entitled to one round of lateral competition... which shall be limited to positions in the employee's competitive level.
>
> (e) Each employee selected for separation pursuant to this section shall be given written notice of at least 30 days before the effective date of his or her separation.
>
> (f) Neither the establishment of a competitive area smaller than an agency, nor the determination that a specific position is to be abolished, nor separation pursuant to this section shall be subject to review except that:
>
> (1) An employee may file a complaint contesting a determination or a separation pursuant to subchapter XV of this chapter or § 2-1403.03; and
>
> (2) An employee may file with the Office of Employee Appeals an appeal contesting that the separation procedures of subsections (d) and (e) were not properly applied.

Accordingly, the issues to be decided in this matter under the aforementioned statute are: 1) whether the employee was afforded one round of lateral competition within his/her competitive level; and 2) whether an employee received thirty (30) days written notice prior to the effective date of their separation from service.

Agency submits that it made reductions in staff on a school-by-school basis, noting that the competitive areas for the RIF were defined by schools where the number of positions for custodial staff or non-instructional staff for the 2008-2009 school year exceeded the amount of positions available for the 2009-2010 school year.[1] Agency further notes that 5 DCMR 1503.1 *et al.* provides guidance pertaining to the implementation of the RIF. Specifically, Section 1503.2 states the following:

> If a decision must be made between employees in the same competitive area and competitive level, the following factors, in support of the purposes, programs, and needs of the organizational unit comprising the competitive area,

[1] Agency's Answer to Employee's Petition for Appeal at p.2 (October 13, 2009).

with respect to each employee, shall be considered in determining which position shall be abolished:

(a) Significant relevant contributions, accomplishments, or performance;

(b) Relevant supplemental professional experiences as demonstrated on the job;

(c) Office or school needs, including: curriculum, specialized education, degrees, licenses or areas of expertise; and

(d) Length of service.

When Agency implemented the RIF, it gave the following weight to each factor as follows:

(a) Significant relevant contributions, accomplishments, or performance – (50%)

(b) Relevant supplemental professional experiences as demonstrated on the job – (30%)

(c) Office or school needs, including: curriculum, specialized education, degrees, licenses or areas of expertise – (10%)

(d) Length of service. – (10%)

Agency argues that it conducted in the RIF in accordance with the DCMR and the D.C. Official Code by affording Employee one round of lateral competition. Agency further maintains that it utilized the aforementioned competitive factors in implementing the RIF and that the two lowest ranked RW Custodians, which included Employee, were terminated. Based on the documents of record and the CLDF submitted by Agency, I find that Employee was afforded one round of lateral competition to which he was entitled.

Title 5 § 1506 provides the notice requirements that must be given to an employee affected by a RIF. Section 1506.1 states that "an employee selected for separation shall be given specific written notice at least thirty (30) days prior to the effective date of the separation. The notice shall state specifically what action is taken, the effective date of the action, and other necessary information regarding the employee's status and appeal rights."

The notice of termination letter was dated July 28, 2011. The letter further stated that the effective date of the RIF was August 28, 2009. Employee therefore received thirty (30) days written notice prior to the effective date of his termination.

Lastly, Employee argues that there was not an actual budget shortfall to justify the RIF. It should be noted that according to the ruling in *Anjuwan v. D.C. Department of Public Works*, 729 A.2d. 881 (December 11, 1998), this Office's authority over RIF matters is narrowly prescribed. The court in *Anjuwan* held that OEA does not have the authority to determine whether the agency conducting the RIF was bona fide or violated any law, other than the RIF regulations themselves. Therefore, this Office does not have the ability to adjudicate the issue of whether Agency's claimed budgetary shortfall violated any law or statute.

Based on the foregoing, I find the Agency complied with D.C. Official Code § 1-624.08. Agency provided Employee with one round of competition and gave Employee thirty (30) days written notice of his termination. Therefore, Agency properly implemented the RIF which resulted in Employee's termination.

ORDER

It is hereby ORDERED that Agency's action of abolishing Employee's position through a Reduction-in-Force is UPHELD

FOR THE OFFICE:

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Sommer J. Murphy, Esq.
Administrative Judge